Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

M. DREW BROWN and BRENDA A. BROWN,
h/w, individually and as guardians and natural parents of
ASHLEY L. BROWN, and DREW C. BROWN,
Petitioners,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improvidently affirmed summary judgment in favor of Defendant, given that the Pennsylvania Supreme Court has granted allocatur in the case principally relied upon by both Courts in order to reach their respective determinations in favor of Defendant.

2. Whether the Court of Appeals improvidently affirmed summary judgment in favor of Defendant(s), given the instant decision conflicts with other Court of Appeals decisions involving the same questions.

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OPINIONS BELOW

The United States District Court, Eastern District of Pennsylvania, granted summary judgment in favor of Respondent in an unpublished order. App. at 3a. The Third Circuit Court of Appeals affirmed the District Court in an unpublished decision rendered on March 7, 1997. App. at 1a.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C.§ 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1.

STATEMENT OF THE CASE

This case arose in November of 1993, when Petitioner, Brenda A. Brown, applied a chemical waterproofing sealant to the brick exterior of the family home in Lansdowne, Pennsylvania. Immediately thereafter, Petitioners experienced the onset of intense physical discomfort as a result of fumes emanating from the sealant. This made it necessary for them to vacate their home, and caused damage to the residence, as well as to household items contained therein. Petitioners incurred expenses for alternate housing due to the inhabitability of their residence, and asserted a claim for damages and expenses pursuant to the provisions of the homeowners' insurance policy issued to them by Respondent.

Respondent cited to the "Pollution Exclusion Clause" contained in the policy language and elected to deny the claim in total based upon that provision.

FACTUAL BACKGROUND

After unsuccessful attempts at resolution, Petitioners filed suit against Respondent in the United States District Court for the Eastern District of Pennsylvania. Following a comprehensive discovery process, there were cross-motions for Summary Judgment filed. On or about June 28, 1996, the District Court, in an Opinion by The Honorable Daniel H. Huyett, III, denied Petitioner's Motion, and granted Summary Judgment in favor of Respondent, relying principally on the holding in *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 678 A.2d 802 (Pa. Super. 1996) allocatur granted April 11, 1997, *Madison Construction Company v. Harleysville Mutual Insurance Co.*, 1995 WL 562297, (Pa. Super., September 25, 1995), *Madison Construction Company v. Harleysville Mutual Insurance Company*, No. 4329 Phila. 1994, 1996 WL 338810 (Pa. Super. June 20, 1996).

On or about September 18, 1996, Petitioners filed a timely Appeal of the District Court's Decision with the United States Court of Appeals for the Third Circuit. On or about March 7, 1997, the Court of Appeals affirmed the Decision of the lower Court for essentially the same reasons stated in the District Court's Memorandum and Order dated June 28, 1996, i.e., the holding in *Madison, supra.* The instant Petition follows.

SUMMARY OF THE ARGUMENT

Five (5) weeks after entry of the Decision of the Court of Appeals, the Pennsylvania Supreme Court granted allocatur to the Plaintiff in *Madison, supra.*, which, it is submitted, clearly evidences that the law of the State of Pennsylvania remains unsettled and in flux as to the critical issue presented in the matter at bar.

Further, there exists a plethora of decisions rendered by Pennsylvania Courts addressing the specific question of insurance policy language interpretation relative to pollution exclusions, and these opinions are by no means consistent. Cf. *O'Brien Energy Sys. Inc. v. American Employer's Ins. Co.*, 427 Pa. Super. 456, 629 A.2d 957 (1983), allocatur denied, 537 Pa. 633, 642 A.2d 487 (1994), *American Iron & Steel Institute v. Environmental Protection Agency*, (1977 CAS) 560 F.2d 589, 10 Envt Rep Cas 1549, 7 ELR 20624, 44 ALR Fed 813, cert. den. (1978), 435 U.S. 914, 55 L.Ed 2d 505, 98 S.Ct. 1467, 11 Envt Rep Cas 1320, *Greater Boston Television Corp. v. Federal Communications Corp.*, (1971) 149 US App. DC 322, 465 F.2d 268, 31 ALR Fed 765, cert. den. 406 U.S. 950, 32 L.Ed 2d 338, 92 S.Ct. 2042, *Island Associates, Inc. v. Eric Group, Inc.*, 894 F.Supp. 200 (W.D. PA. 1995).

The same inconsistency exists in other jurisdictions and cases, as evidenced by the Opinions in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992), *Conde v. State Farm Fire and Casualty Company*, 43 F.3d 1471, 1994 WL 7050 73 at II (6th Cir. 1994), *Prudential-LMI Commercial Ins. Co. v. Meadowwood Condominium Assoc.*, 1992 WL 189490 (E.D. Pa. 1992), *Grinnel Mut. Reinsurance Co. v. Wasmuth*, 432 N.W. 2d 495 (Minn App. 1988).

This gives rise to a reasonable conclusion that the subject policy language at issue is susceptible to more than one interpretation. *Cohen v. Erie Indemnity Company*, 288 Pa. Super. 445, 451, 432 A.2d 596, 599 (1981).

REASONS FOR GRANTING THE WRIT

I. PETITIONERS HAVE BEEN IMPROPERLY PRECLUDED FROM HAVING THEIR CLAIM ADJUDICATED ON THE MERITS, BY VIRTUE OF AN ERRONEOUS DECISION ENTERED BY THE LOWER COURT.

Summary Judgment is a proper mechanism for deciding and disposing of matters in which there are no material issues in question. The case *sub judice* demands studied inquiry and deliberate consideration of the matter in dispute, as it implicates genuine and legitimate questions of both law and fact.

II. THE DECISION BELOW WAS PREMISED UPON STATE CASE LAW THAT IMMEDIATELY POST-DECISION WAS ACCEPTED FOR REVIEW BY THE PENNSYLVANIA SUPREME COURT.

The Court of Appeals rendered it's Decision on March 7, 1997, and cited to the Memorandum and Order of the District Court as support for that finding. Of particular significance is that the initial Decision in *Madison* was in favor of Plaintiff. Upon reconsideration, a determination in favor of Defendant followed. The Court of Appeals relied exclusively on *Madison, supra.*, in granting summary judgment to Respondent. On April 11, 1997, the Pennsylvania Supreme Court granted allocatur to the Plaintiff in *Madison*, and the matter presently remains under review. The procedural history demonstrates the difficulty this issue has engendered for the judiciary.

III. THE LAW IS UNSETTLED AS TO INTERPRETATION OF INSURANCE POLICY POLLUTION EXCLUSION LANGUAGE, AND SHOULD BE RESOLVED BY THIS COURT.

The cases cited herein clearly demonstrate the inconsistent results in matters involving interpretation and application of insurance policy pollution exclusion language. This problem is pervasive, and a significant number of state and federal courts are struggling with this issue. In order to provide uniformity and a clear rule of law, this Court should resolve these inconsistencies.

CONCLUSION

There have been compelling reasons set forth to justify the granting of this Petition for Writ of Certiorari. Assuming *arguendo* that the Opinion of the Third Circuit Court of Appeals was in accord with applicable law, the foundation of that Decision was the holding in *Madison, supra.*, which is now under scrutiny by the Pennsylvania Supreme Court. As such, the holding of the Court of Appeals, was, at best, premature. An unfortunate circumstance of timing should not work to deny Petitioners their right to present their proofs and have a full and fair adjudication of the claim based on the merits.

The Petitioners herein respectfully request that this Honorable Court grant the Petition.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1618

M. DREW BROWN; BRENDA A. BROWN,
H/W, INDIVIDUALLY AND AS GUARDIANS AND
NATURAL PARENTS OF ASHLEY L. BROWN,
AND DREW C. BROWN

Appellants

v.

AMERICAN MOTORISTS INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Action No. 94-07505)
District Judge: Honorable Daniel H. Huyett, 3d

Submitted Under Third Circuit LAR 34.1(a)
February 28, 1997
Before: SCIRICA and ALITO, *Circuit Judges*,
and LAY, *Senior Circuit Judge*[*]

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[*] Honorable Donald P. Lay, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court entered on July 2, 1996 be and is hereby affirmed essentially for the reasons stated in the district court's memorandum and order dated June 28, 1996. Costs taxed against appellants.

BY THE COURT

/s/ (signature illegible)
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: MAR 7 1997

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 94-7505

M. DREW BROWN and BRENDA A. BROWN, h/w, INDIVIDUALLY AND AS GUARDIANS AND NATURAL PARENTS OF ASHLEY L. BROWN, AND DREW C. BROWN,

Plaintiffs

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant

MEMORANDUM & ORDER

HUYETT, J. **June 28, 1996**

Plaintiffs M. Drew and Brenda A. Brown and Defendant American Motorists Insurance Company have filed cross Motions for Summary Judgment. For the reasons discussed below, Plaintiffs' Motion will be **DENIED** and Defendant's will be **GRANTED**.

I. *BACKGROUND*

Although the parties disagree on many of the facts surrounding Plaintiffs' claims, the material facts are not in dispute. In November of 1993, Plaintiff Brenda Brown applied a chemical waterproofing sealant to the brick exterior of Plaintiffs' home in Lansdowne, Pennsylvania. Plaintiffs allege that fumes, (Am. Compl. ¶11g; Pls. Answer to Def.'s First Set of Interrogs. ¶2; M. Brown Dep. at 64-65; B. Brown

Dep. at 33-35), from the sealant caused them intense physical discomfort, which made it necessary for them to vacate their home. They claim damage to the house and to their personal belongings, and that they incurred additional living expenses because of the inhabitability of their home. In December of 1993, Plaintiffs filed a property loss claim under their homeowners insurance policy with Defendant. Defendant denied the claim on the grounds that it fell within the policy's pollution exclusions.[1] Plaintiffs then brought this suit, claiming in five counts that Defendant breached the insurance contract and used bad faith in denying coverage.

II. *DISCUSSION*

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. BREACH OF INSURANCE CONTRACT

Interpretation of an insurance policy is a matter for the Court, rather than for the jury. *Allstate Ins. Co. v. Brown*, 834 F. Supp. 854, 856 (E.D. Pa. 1993). Whether a particular loss is within a policy's coverage is a question of law that may be decided at the summary judgment stage. *Aetna Life & Casualty Co. v. Barthelemy*, 836 F. Supp. 231, 235 (M.D.

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[1] In relevant part, the exclusion provides that Defendant does not insure against loss caused by "[d]ischarge, dispersal, seepage, migration, release or escape of pollutants." (Policy at 7-8.) "Pollutant" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." (*Id.* at 8.)

Pa. 1993), *rev'd on other grounds*, claim falls outside the coverage provided by the policy issued by Defendant.

1. The Pollution Exclusion

Plaintiffs' claim for damage to their house falls squarely within the pollution exclusion clause, which was quoted above at footnote 1. The Court is required to give effect to clear and unambiguous language in an insurance policy, as that language most accurately manifests the intent of the parties. *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, No. 4329 Phila. 1994, 1996 WL 338810, at *2 (Pa. Super. June 20, 1996). A term is unambiguous unless "reasonable people, considering it in the context of the entire policy, would honestly ascribe different meanings to it." *Allstate*, 834 F. Supp. at 857. The Court is not to torture policy language to create ambiguities. *St. Paul Fire & Marine Ins. Co. v. United States Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981).

Plaintiffs argue that the noxious fumes that made their home unlivable were not "pollutants" under the pollution exclusion because the fumes came from any over-the-shelf product, used in an everyday activity. Essentially, Plaintiffs' position is that a common sense understanding of the term pollutants, as reasonably understood by Plaintiffs, does not include the fumes here.

Whether or not fumes from a household product would commonly be understood as a pollutant is not the issue, however. The term pollutant is defined in the policy to include solid, liquid and gaseous irritants and contaminants, including fumes and vapors. This definition is clear and unambiguous, and includes the fumes that Plaintiffs claim caused them sufficient irritation to make them vacate their home. *See Madison Constr. Co.*, 1996 WL 338810, at *3 (finding fumes from commonly used sealant a pollutant under

similarly worded pollution exclusion). Where a term is clearly and unambiguously defined in a policy, the Court will not substitute a common definition of the term for the definition contained in the policy. *American State Inc. Co. v. Nethery*, 79 F.3d 473, 475-76 (5th Cir. 1996) (refusing to substitute common meaning of "pollutant" for policy definition).[2] The policy definition of pollutants includes the fumes at issue here, and that definition must be given effect.

Plaintiffs next argue that the policy phrase "discharge, dispersal, seepage, migration, release or escape" is ambiguous because it was not intended to apply to the everyday activities of a homeowner; rather, Plaintiffs argue that the phrase was intended to apply only to intentional acts of polluters who cause harm to the environment. This argument is without merit. The best manifestation of the intent of the parties is the clear and unambiguous language of the policy. *Madison Constr. Co.*, 1996 WL 338810, at *2. Plaintiffs have not identified any ambiguity in the language quoted above, and none is apparent to the Court. *See id.* at *3-4 (no ambiguity in similar situation). Accordingly, the Court declines to look to, or speculate on, the intent of the parties in an attmept to avoid the plain meaning of policy language. *Id.*

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[2] Plaintiffs place great reliance on *Island Assocs., Inc. v. Eric Group, Inc.*, 894 F. Supp. 200 (W.D. Pa. 1995) for their argument that the commonly understood definition for pollutant should be substituted for the policy definition. *Island Assocs.* is unpersuasive in that it conflicts with the Third Circuit's analysis of the proper use of an insured's reasonable expectations. *See Bensalem Twp. v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311-12 (3d Cir. 1994) (explaining that reasonable expectations of insured only defeat unambiguous policy language where insurer has created reasonable expectation of broader coverage). Moreover, the Pennsylvania Superior Court recently reaffirmed the importance of the plain meaning of policy language in a case with facts similar to the instant case. *Madison Constr. Co.*, 1996 WL 338810, at *3-4.

It is undisputed and undisputable that the fumes seeped or migrated into the house. (*See* Am. Compl. ¶8; Brown Dep. At 35; D. Brown Dep. At 157-58; Pls. Answer to Def.'s First Set of Interrogs. ¶2.) Therefore, Plaintiffs' house damage claim falls within the plain language of the pollution exclusion, and outside the coverage provided by Defendant.[3]

2. Personal Property Coverage

Plaintiffs' homeowners policy insures against damage to personal property caused by certain enumerated perils. (Policy at 8.) The only enumerated peril invoked by Plaintiffs, and the only one even arguably implicated here, is smoke. "Smoke" is defined, somewhat circuitously, as "sudden and accidental damage from smoke." (Policy at 8.)

Smoke did not cause Plaintiffs' damages. First, "damage from smoke" does not encompass contamination from chemical fumes. *K & Lee Corp. v. Scottsdale Inc. Co.*, 769 F. Supp. 870, 873-74 (E.D. Pa. 1991), *aff'd*, 953 F.2d 1380 (3d Cir. 1992). Second, the damage here was not "sudden," *see Northern Ins. Co. v. Aardvark Assoc., Inc.*, 743 F. Supp. 379, 380 (W.D. Pa. 1990) (defining "sudden" as "abrupt and lasting only a short time"), *aff'd*, 942 F.2d 189 (3d Cir. 1991); on the contrary, it occurred gradually, over time, (B. Brown Dep. at 11; M. Brown Dep. at 157-58). Thus, any damage to Plaintiffs' personal property falls outside the coverage provided by Defendant.

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[3] There is a limited exception to the pollution exclusion clause that applies where the "discharge, dispersal, seepage, migration, release or escape [was] itself caused by [smoke]." (Policy at 8.) As discussed in the context of personal property, *infra.* smoke was not involved in Plaintiffs' claimed loss.

3. Living Expenses

Coverage for additional living expenses is predicated on a covered loss that makes an insured's residence "not fit to live in." (Policy at 4.) As discussed above, the loss to Plaintiffs' residence is not a covered loss. As a result, Plaintiffs' additional living expenses are not covered under the policy.[4]

B. BAD FAITH

To prevail on their bad faith claims, Plaintiffs would have to prove, *inter alia*, the absence of a reasonable basis for denying benefits. *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 307-08 (3d Cir. 1995). As Plaintiffs' claims fall outside the policy coverage, Defendant's denial of coverage was necessarily reasonable, and Plaintiffs' cannot prevail on their bad faith claims.

III. *CONCLUSION*

There is no genuine issue of material fact in dispute, and Defendant is entitled to judgment as a matter of law on all of Plaintiffs' claims. Accordingly, summary judgment will be granted in favor of Defendant and against Plaintiffs. An appropriate Order follows.

/s/ Huyett
HUYETT, J.

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[4] Along with property damage and additional living expenses, Plaintiffs claim damages fro bodily injury and emotional distress. The policy issued by Defendant is a property policy that provides no coverage for these types of injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 94-7505

M. DREW BROWN and BRENDA A. BROWN, h/w, INDIVIDUALLY AND AS GUARDIANS AND NATURAL PARENTS OF ASHLEY L. BROWN, AND DREW C. BROWN,

Plaintiffs

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Defendant

ORDER

HUYETT, J. **June 28, 1996**

For the reasons stated in the foregoing Memorandum, Plaintiffs M. Drew and Brenda A. Brown's Motion for Partial Summary Judgment is **DENIED**, and Defendant American Motorists Insurance Company's Motion for Summary Judgment is **GRANTED**. Judgment is entered in favor of defendant and against Plaintiffs on all of Plaintiffs' claims.

IT IS SO ORDERED.

s/ Huyett
HUYETT, J.